MOTION FILED

JAN 25 1995

(5)

No. 94-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,
Petitioners,
vs.
RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO
Case Nos. 94SA48 & 94SA128

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE & BRIEF AMICUS CURIAE OF THE FAMILY DEFENSE COUNCIL

in support of the *Petitioners*

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE FAMILY DEFENSE COUNCIL
in support of the *Petitioners*

The Family Defense Council (FDC), by its attorney, Robert K. Skolrood, of the National Legal Foundation, moves this court pursuant to Rule 21.2(b) of the Supreme Court of the United States for leave to file a brief amicus curiae in the aforementioned action to present arguments stating why the petitioners' request should be granted. This request is based on Rule 10.1(c) of the Supreme Court of the United States.

The FDC is a national, non-profit, non-sectarian organization that has been at the forefront of the public debate over the importance of traditional morality and the danger of non-traditional lifestyles. The FDC's experience in assisting local communities decide their moral environment free from special interest group pressure enables the Council to bring new issues to the attention of this Court.

The following parties, represented by counsel, have refused to consent to the filing of the attached brief amicus curiae:

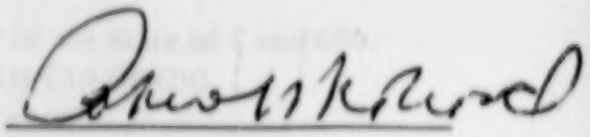
Jean E. Dubofsky, Lead Counsel
Representing: Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, and the Boulder Valley School District RE-2.
Refused Consent.

Edward M. Caswall, Esquire
Representing: The City of Aspen and the City Council of Aspen.
Refused Consent.

Joseph N. DeRaismes, III, City Attorney
Representing: The City of Boulder.
Refused Consent.

Darlene M. Ebert, Assistant City Attorney
Representing: The City and County of Denver.
Refused Consent.

The petitioners have consented to the filing of this brief amicus curiae.



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INTEREST OF AMICUS

The Family Defense Council (FDC) is a national, non-sectarian, not-for-profit organization, the purpose of which is to promote and preserve traditional family values.

The FDC has expended considerable resources in educating the public about the importance of traditional morality and the implication of threats that undermine the continuing vitality of the American family.

The Chairman of the Board of FDC is Dr. Howard L. Hurwitz of Jamaica, New York. He has over forty years experience as a history teacher, high school principal, and educational consultant. He has authored numerous books on history, education, and economics. He is a nationally recognized authority on education and the social significance of the family in America.

The FDC, under the direction of Dr. Hurwitz and its board, in addition to its efforts in the promotion of the traditional family, desires to maintain the right of the people to establish those principles that will be most conducive to the strengthening of the family. The FDC believes that the citizens of the states should be free to pursue by constitutional means those matters that are of concern to society and the family. The FDC, as a national organization, is interested in protecting the right of the citizens of Colorado, as well as the right of citizens in all states to direct their government in support of undergirding the traditional family.

The FDC believes that as amicus curiae its experience on matters affecting the family will be of assistance to this court in evaluating and deciding this petition.

REASONS FOR GRANTING THE PETITION

I. The Colorado Supreme Court's Decision Is Contrary To This Court's Decisions As Well As Its Settled Fundamental Rights Jurisprudence

The decision of the Colorado Supreme Court conflicts with this Court's decisions in *Richardson v. Ramirez*, 418 U.S. 24 (1974) and in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Moreover, it departs significantly from this Court's approach to fundamental rights under both the Fourteenth Amendment's Equal Protection and Due Process Clauses.

A. The Opinion Below Conflicts With Richardson v. Ramirez

At the heart of the court's opinion below, is the proposition that the Fourteenth Amendment's Equal Protection Clause prohibits the people of a state from "fencing out an identifiable group" from participating fully in the state's political processes. In support of its position, the court stated:

> Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden -- no other group's ability to participate in the political process is restricted and encumbered in a like manner. Such a structuring of the political process undoubtedly is contrary to the notion that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."
>
> In short, gay men, lesbians and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons.

Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993), *cert. denied*, 126 L.Ed.2d 365 (1993) (*Evans I*) (citations omitted).

Twenty years ago, this Court rejected this kind of extreme egalitarian analysis even when applied to the firmly established fundamental right to vote. In *Ramirez*, this Court turned away an effort to extend its earlier voting rights cases to "support the conclusions of the Supreme Court of California that a State must show a 'compelling state interest' to justify exclusion of ex-felons from the franchise." *Ramirez*, 418 U.S. at 54. By refusing this invitation, this Court affirmed the right of the people of a state to impose a constitutional barrier that clearly "fenced out" an "identifiable group" not only from participating equally in the political processes, *but from the vote, itself.*

In its opinion in *Ramirez*, this Court did not carve out an exception to a general constitutional rule of political equality. To the contrary, this Court reasoned that the Equal Protection Clause of the Fourteenth Amendment should not be construed to prohibit historically sanctioned practices of disqualifying certain citizens from the right to vote.[1] As for the exclusion of convicted felons from exercising the franchise, this Court found convincing historical evidence in Section 2 of the Fourteenth Amendment, in the state constitutions in existence at the time of the adoption of the Fourteenth Amendment, and in Congressional actions readmitting the southern states to the union.[2] In addition, this Court pointed to a number of United States Supreme Court opinions, dating from 1885, affirming the exclusion of convicted felons, "bigamists and polygamists," nonresidents and minors from the voting privilege.[3]

The lesson of *Ramirez* is clear. The meaning of "equal protection" must be shaped in conformity with legitimate historical and judicial understandings of equality. Such understandings, the *Ramirez* majority

1 *See Ramirez*, 418 U.S. at 41-54.
2 *Id.* at 41-52.
3 *Id.* at 53.

ruled, could not be discarded as "outmoded," no matter how appealing more enlightened views of political equality and democratic participation might be. *Such matters belong to the people, not this Court. Ramirez*, 418 U.S. at 55.

The impact of *Ramirez* on this Court's fundamental rights jurisprudence was not lost on dissenting justices Thurgood Marshall and William Brennan. Justice Marshall, writing for himself and Justice Brennan, chided the majority for "'shackl[ing]'" the Fourteenth Amendment's Equal Protection Clause to a "'political theory'" of an earlier era and "'to historic notions of equality.'"[4] Then, with reasoning strikingly similar to that employed by the Colorado Supreme Court, Justice Marshall proceeded to show why he thought that the Equal Protection Clause of the Fourteenth Amendment prohibited states from denying the right to vote to convicted felons.

First, like the court below, Justice Marshall began with a general proposition from this Court's early voting cases:

> Th[is] analysis properly begins with the observation that . . . the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government . . . ."

Ramirez, 418 U.S. at 77 (Marshall, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

Then, again like the Colorado Supreme Court, Justice Marshall invoked, without analysis or discussion, the strict scrutiny standard.[5] He, like the court below, simply assumed that denial of full participation in the political process required, without more, proof of a compelling state interest. Having made this assumption, Justice Marshall, like the Colorado court, rejected every effort of the state to justify any departure

4 *Ramirez*, 418 U.S. at 76 (Marshall, J., dissenting) (quoting *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966)).
5 *Id.* at 78.

from his constitutional premise, namely, absolute political equality. *Ramirez*, 418 U.S. at 78-86.

In *Ramirez*, California attempted to justify its constitutional provision denying the franchise to convicted felons on the grounds that such a denial would preserve the "interests of an orderly society."[6] Justice Marshall interjected that fencing out a sector of the population was constitutionally impermissible. Societal order and stability, he reasoned, was constitutionally subordinate to equal participation in the political process:

> The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as conceived by a majority of the voting public, is constantly undergoing re-examination. This Court's holding in Davis, supra, and Murphy, supra, that a State may disenfranchise a class of voters to "withdraw all political influence from those who are practically hostile" to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views.

Ramirez, 418 U.S. at 82.

What dissenting Justice Marshall found to be constitutionally impermissible in *Ramirez*, the Colorado Supreme Court found to be forbidden in this case, and for substantially the same reasons:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. . . .
>
> . . . .
>
> Prior to the passage of this amendment, gay men, lesbians, and bisexuals were . . . free to appeal to state and local government for protection against discrimination . . . . Thus, like any other members of the electorate, the political process was open to them to seek legislation or other enactments deemed beneficial in the same way it was open to all others.

Evans I, 854 P.2d at 1285-86 (footnote omitted).

Given this egalitarian view of the Fourteenth Amendment's Equal Protection Clause, the Colorado court, like dissenting Justice Marshall in *Ramirez*, rejected the state's plea that Amendment 2 served the compelling state interest of preserving societal order, in this case, by deterring factionalism.

> We reject the argument that the interest in deterring factionalism . . . is compelling. Political debate, even if characterized as 'factionalism,' is not an evil which the state has a legitimate interest in deterring but rather, constitutes the foundation of democracy.

Evans v. Romer, 882 P.2d 1335, 1348 (Colo. 1994) (*Evans II*).

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6 *Ramirez*, 418 U.S. at 81 (Marshall, J., dissenting).

This is astounding! James Madison devoted an entire Federalist Paper[7] to justification of a number of constitutional limitations as "cur[es for] the mischiefs of faction[s]." The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). According to this Court's holding and reasoning in *Ramirez*, such historical practices cannot be torpedoed by modern notions of "equality" and "democracy" lest the Fourteenth Amendment's Equal Protection Clause collide head-on with a number of time-honored principles that characterize the constitutionally guaranteed "republican form of government." U.S. Const. art. IV, § 4.

Even in the voting rights cases, this Court has not yielded to extreme egalitarian claims such as those embraced by the Colorado Supreme Court. For example, this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), approved a state legislative redistricting scheme that deviated significantly from the one-person, one-vote rule applied to Congressional redistricting. In support, this Court recalled that the seminal voting rights case, *Reynolds v. Sims*, 377 U.S. 533 (1964), anticipated that its equality rule governing the weight of a person's vote in electing members of a state legislature could be tempered by the preservation of traditional and historical political subdivisions. *Mahan*, 410 U.S. at 321-22. In *Mahan*, this Court ruled that the interest in preserving such subdivisions did not need to be compelling, nor necessary, but only "reasonabl[e] . . . to advance the rational state policy of respecting the boundaries of political subdivisions." *Id.* at 328.

This Court should grant the requested writ of certiorari and repudiate the extreme egalitarian views of the Colorado Supreme Court by rendering a decision in this case in keeping with its insistence that no fundamental right may be forged under the Equal Protection Clause of the Fourteenth Amendment in disregard of the nation's history and judicial precedent.

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7 The Federalist No. 10 (James Madison).

B. The Opinion Below Conflicts With Bowers v. Hardwick

The lesson of history is equally applicable to the Colorado Supreme Court's decision to include "gay men, lesbians, and bisexuals" in the category of "identifiable groups" to be protected, in its view, from state measures that deny to them equal participation in the political process.

Only once in its opinions below, did the Colorado Supreme Court address the contention that its protection of homosexuals might conflict with this Court's holding in *Bowers*. And then its treatment was brief:

> The fact that there is no constitutionally recognized right to engage in homosexual sodomy, *see Bowers v. Hardwick* . . . is irrelevant. Amendment 2 by no stretch of the imagination seeks to criminalize homosexual sodomy. While it is true such a law could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process is also constitutionally permissible. The government's ability to criminalize certain conduct does not justify a corresponding abatement of an independent fundamental right.

Evans II, 882 P.2d at 1350 (citation omitted).

Such cavalier treatment of the *Bowers'* precedent reveals once again that the court below has deliberately refused to follow the authoritative guidelines of this Court.

In *Bowers*, this Court painstakingly set out the legal criteria governing the application of its fundamental rights doctrine under the Fourteenth Amendment's Due Process Clause. And, as is the case with fundamental rights under the Fourteenth Amendment's Equal Protection

Clause, this Court has determined that questions of fundamental rights under the Due Process Clause of the Fourteenth Amendment require a careful assessment of history. *See also, Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring).

Accordingly, in *Bowers* this Court began its analysis of the claim that homosexual conduct in private between consenting adults is a fundamental right by observing that, at the time of the ratification of the Fourteenth Amendment, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Bowers*, 478 U.S. at 193 (footnote omitted). This Court noted further that, prior to that date, and for nearly 100 years thereafter, as many as 100 percent of the states "provide[d] criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 194. Given this historical record, this Court refused constitutional protection to private homosexual conduct between consenting adults:

> [T]o claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Bowers, 478 U.S. at 194.

This Court having so decisively rejected the claim that homosexual behavior is a fundamental right under the Fourteenth Amendment's Due Process Clause, numerous United States Courts of Appeal have concluded that *Bowers* absolutely precludes homosexuals from qualifying as a suspect class deserving strict scrutiny under equal protection. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 & n.6 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1075-76 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied sub nom., Ben-Shalom v. Stone*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). What a state could constitutionally make criminal cannot possibly be the basis of a

suspect classification for the purposes of equal protection. *Padula*, 822 F.2d at 103.

If, given *Bowers*, homosexuality cannot be a suspect classification qualifying for strict scrutiny under the Fourteenth Amendment's Equal Protection Clause then how, given *Bowers*, can homosexuals be an "identifiable group" qualifying for strict scrutiny under that same clause? In its opinion below, the Colorado Supreme Court did not address, much less answer, this question.

If a state may criminalize homosexual behavior, as *Bowers* has ruled, it may, according to *Ramirez* deny the elective franchise to any person convicted of that crime. Why, then, could not a state prohibit, by constitutional amendment, the enactment of laws granting heightened protection for persons when it could criminalize that behavior and, potentially, deny to the entire class the right to vote? Again, the Colorado Supreme Court did not address, much less answer, this question.

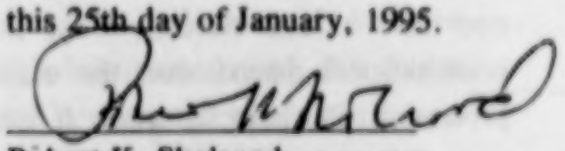
The United States Courts of Appeal have tackled the tough questions and, on the basis of *Bowers*, denied constitutional protection to homosexuals as a suspect class. On the basis of these decisions alone, this Court should grant this petition for writ of certiorari and reverse the decision below.

CONCLUSION

By disregarding this Court's rulings that "equality" and "fundamental rights" must be defined consistently with legitimate historical and traditional distinctions, the court below rendered a decision inconsistent with this Court's rulings in *Ramirez* and *Bowers*.

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted
this 25th day of January, 1995.



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